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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1955.

No. .....

KANSAS CITY SOUTHERN RAILWAY COMPANY, A CORPORATION, *Petitioner,*

vs.

JAMES H. CAGLE, - - - - - - *Respondent.*

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Kansas City Southern Railway Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on the 27th day of December, 1955.

Citations to the Opinions Below.

The opinion of the Circuit Court of Appeals for the Tenth Circuit is unreported and is printed in Appendix A hereto, *infra,* pages 11 to 15. The Judgment of the Circuit Court of Appeals is printed in Appendix A hereto, *infra,* pages 15 and 16. The Journal Entry of Judgment of the United States District Court for the Northern District of Oklahoma is printed in Appendix A hereto, *infra,* pages 16 and 17.

Jurisdiction.

Rehearing was denied February 2, 1956 (R., p. 18). The jurisdiction of the Court is invoked under 28 United States Code, Section 1254(1). Conflict of decisions of the several circuits is so definite that uniformity can be secured only by a determination from this Court. The statute involved applies to a large section of national commerce and a great group of our industrial population. The importance of a decision on the controlling question is general and not confined to the litigants in this particular case. Order Staying Mandate issued February 14, 1956 (R., p. 18) granting a stay of thirty days and thereafter subject to further order of the court.

Question Presented.

What is the test of compliance with the Couplers Act?

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of going between the ends of the cars." 45 U. S. C. A., Section 2.

Statute Involved.

The statutory provision involved in Title 45, Section 2, U. S. C. A., known as the Couplers Act, a division of the Safety Appliance Act. The section is printed in Appendix B, *infra*, page 17.

Statement.

Your petitioner, Kansas City Southern Railway Company, was engaged in interstate commerce and operating a railway line in various states, including the State of Arkansas where this injury occurred. On the first day of October, 1953, the plaintiff, James H. Cagle, was an employee of such railway company as a brakeman and was engaged in his regular line of employment and his statement of this transaction, a part of the record below, fully and concretely covers the facts in this case and is as follows, to-wit:

> "I have been engaged in this particular kind of work an awful lot and have coupled lots of cars, in an eight-hour shift maybe 35 to 65 cars, and that's part of the daily work of a switchman. I can tell on approaching a drawbar when it is out of line. Under such conditions it is the duty of the brakeman to go in between the cars and pull the drawbar over, or if it is over towards him he can probably take his foot and shove it over. There is no mechanical device to do that and I never have seen them fitted with any spring or metal mechanism to keep them in the center. It is the practice of all brakemen to pull them with their hands or shove them with their feet and there is no other way of getting the job done.
>
> "When the train was brought to a stop I stepped over and got hold of the drawbar and I was pulling on it and it moved just a little and hung and I pulled harder and I felt a pain like a hot poker across my back but I had moved the drawbar enough to make the coupling. After I had moved it sufficiently we made the coupling. I gave the signal to the engineer. He started back to the Rock Island car and the southerly end of the train car and the northerly end of the Rock Island car came together and coupled automatically, just as they are supposed to do." (R., pp. 15 and 16)

On the following day inspection was made of the car, and all the machinery of the car, including the coupler, was found free from defects.

The plaintiff alleged injury consisting of a herniated intervertebral disk and total disability.

The court instructed the jury, among other things:

> "You are instructed that if you find by a fair preponderance of the evidence that the drawbar on the Rock Island car was out of proper alignment and would not couple automatically upon impact and if you further find from a preponderance of the evidence that the plaintiff suffered injury or damages while attempting to adjust the drawbar and put it in such position that it would couple automatically upon impact, then your verdict in this case should be in favor of the plaintiff and against the defendant." (R., p. 50)

The judgment of the trial court was for the plaintiff and this judgment was affirmed by the Circuit Court of Appeals for the Tenth Circuit in the opinion as shown by Exhibit A attached hereto, page 11.

The injury suffered by this plaintiff was incurred while he was in performance of his duties as a brakeman, in which work he had many years' experience and the particular act in which he was engaged was a matter of frequent occurrence and there was no other known manner of performing such service. There was no defect in the machinery and no negligence on the part of any employee of the company.

In affirming the judgment of the trial court the Circuit Court of Appeals for the Tenth Circuit stated:

> "Without exception the cases have held that operating a car on which the drawbar is so far out of line

as to prevent automatic coupling violates the Act and imposes absolute liability."

To sustain this statement the court refers to four cases:

Atlantic City R. R. Co. v. *Parker*, 242 U. S. 56;
Hohenleitner v. *Southern Pac. Co.*, 177 Fed. 796;
San Antonio & A. P. R. Co. v. *Wagner*, 241 U. S. 476;
Chicago, St. P., N. & O. Ry. Co. v. *Muldowney*, 130 F. 2d 971.

These decisions, as will be found in other decisions, use the same phraseology as quoted by the Circuit Court. In each case, however, of the decisions so cited, a test was shown before noncompliance was declared.

In the *Parker* case, *supra*, in the first part of the opinion the Court said:

"The engine had backed for the purpose of coupling with the car and had failed to couple automatically by impact."

In the *Hohenleitner* case, *supra*, page 797:

"* * * so that when the couplers, in use on the cars by which he was killed, met, they passed by each other and would not couple without a person going between the cars to adjust them * * *."

In the *Wagner* case, *supra*, on page 483 of the opinion:

"The evidence of bad repair in the automatic equipment was not confined to the fact that the drawbar on the engine was out of line; the fact that the coupling pin on the box car failed to drop as it should have done at the first impact, and required manipulation in preparation for the second impact * * *."

And in the *Muldowney* case, *supra*, on page 976:

"On a fair trial the coupling failed to make on impact."

Had the same test or a similar one to suit the facts in the case been given in the instant case as required in each of the four cases cited above, full compliance would have been shown. The admitted facts as shown by our record (page 2 of statement) show that the coupling was made as soon as given a fair test, and a fair test is what we asked for in this case. That is what we attempt to show in the decisions cited and quoted from in the following paragraphs.

Reasons for Granting This Writ.

The decision of the court below in the instant case, or upon the authorities on which the instant case was decided, is directly in conflict with the decision of this Court in the case of *Affolder* v. *New York, C. & St. L. R. Co.*, 339 U. S. 96, wherein this court held on page 99 as follows:

> "Of course this assumes that the coupler was placed in a position to operate on impact. Thus if 'the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been properly opened,' the railroad had a good defense. The Court of Appeals also found fault with the charge on the ground that it deprived defendant of this defense."

And the following opinions which determine the construction of this Act, in each of which the court takes the contrary view to the decision announced in this case, are briefly stated as follows:

Chesapeake & O. Ry. Co. v. *Arrington*, 101 S. E. 415, 126 Va. 194:

> "Side play in a coupler, according to a standard and generally accepted use on all railroads, does not constitute a 'defect' within the meaning of the federal Safety Appliance Act. (U. S. Comp. St., Section 8605, *et seq.*)"

And more fully explained in the opinion of the court of page 421:

> "The first clause of the instruction is merely to the effect that side play, according to a standard and generally accepted use on all railroads, does not constitute a defect. This is obviously true, for railroads cannot be built upon straight lines, and when rounding curves some lateral play is absolutely necessary.
>
> "Mr. Justice HOLMES in *Atlantic City Railroad Co.* v. *Parker*, 242 U. S. 59, 37 Sup. Ct. 70, 61 L. ed. 152, says, 'Some lateral play must be allowed to drawheads'."

Western Atlantic R. R. v. *Gentle*, 198 S. E. 257, 59 Ga. App. 282, certiorari denied in 305 U. S. 654, at page 262:

> "The railroad has complied with the law when it equips its cars with couplers designed to couple automatically upon impact without the necessity of men going between the ends of the cars, which couplers are of general use among well-regulated railroads, and unless the failure of the coupler to couple on a given occasion results from some defect therein, the railroad cannot be held responsible for injuries resulting proximately therefrom. We think that this is apparent from the mass of adjudications under this section."

And on page 263:

> "In no case called to our attention by the very exhaustive and able briefs filed by counsel for both parties, or any that our research has revealed, has it been expressly ruled that the mere showing that upon one occasion couplers did actually fail to couple, authorized a finding that the couplers were defective though it may be inferable therefrom that such be the case."

Kansas City, M. & O. Ry. Co. v. *Wood*, 262 S. W. 520, at page 523:

"It would be manifestly unfair to hold that the carrier had violated the statute until the inefficiency of the device had been disclosed by some reasonable test that would justify the conclusion that it was defective."

Southern Ry. Co. v. *Stewart,* (8th Cir.) 119 F. 2d 85:

"It is generally held that a violation of the statute is shown by proof that cars *upon a fair trial* failed to couple automatically by impact. Neither of the parties here question these generally applicable tests. Having them in mind, we shall refer to the proof."

Devaney v. *Atchison, T. & S. F. Ry. Co.,* 27 P. 2d 635, 219 Cal. 487, at page 638:

"The giving of an instruction which has the effect of stating to the jury that the mere failure of the device to operate is conclusive evidence of a violation of the act does not find authority in any of the cases."

Fleming, et al., v. *Kellett,* (C. C. A., 10th Cir.) 167 F. 2d 265:

"The Federal Employers' Liability Act does not 'make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence not the fact that injuries occur * * *,' citing numerous cases, from one of which, *Ellis* v. *Union Pacific R. Co.,* 329 U. S. 649, 67 Sup. Ct. 598, we quote from page 653, as follows:

> 'The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be "in whole or in part" the cause of the injury'."

The conflict in the above cases and the opinions as rendered by the court in the instant case is so apparent that a definite decision is vitally important, and a succinct defi-

nition should be given on a question of this nature, which should answer this question: Is misalignment of the coupler a failure to comply with this Act, unless such misalignment is coupled with some defect of appliance of negligence? We assert that this matter has been in dispute and must remain so until settled by the Supreme Court.

Clearly, this question presented is of importance to the administration of an Act that is almost daily called into controversy.

In addition to the decisions of diverging opinions as above shown the further question in involved: "Going between the cars" (quoted from the Act) is a vital part of this legislation and clearly was considered in connection with the danger of going between the moving cars. Since all of this legislation was enacted for the purpose of safety then the question of safety should be involved in any determination of the Act. When both cars with which coupling must be made are stationary, as is shown by the facts in this case, the danger of going between the cars is not present. The legislation was to preserve the safety of the employee in moving traffic. See *Muldowney* case above in which it was said at page 977:

> "If the deceased on approaching the south end of the Swift & Co. freight car discovered that the coupler was off-center or in such position that a coupling could not be made, it was proper for him to undertake to adjust or align it, if he proceeded to do so in the usual and customary manner and was using due care of his own safety."

In carrying on transportation by railway the simple fact of "going between the cars" is a matter of most frequent occurrence. Can it be said that this Act applied to any injury

that occurs on any occasion when an employee goes between the cars? Since it is evident that the intendment of this legislation would not apply to such act, minus the dangers of it, then it should not be applied in this case. The injury occurring to this employee did not occur from any failure to comply with the provisions of this Act. By the opinion of this same circuit, Tenth Circuit, in the *Fleming* case above quoted:

> "The basis of his liability is his negligence, not the fact that injuries occur."

Likewise citing *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649.

Settlement of the question by this Court is plainly in the public interest since it is likely to be presented in almost any jurisdiction where an injury occurs to an employee of a railway company.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

KELLY BROWN,
Counsel for Petitioner.

P. H. HARDIN,
JOHN M. WHEELER,
Counsel of Record.

February 24, 1956.

APPENDIX A.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT.
November Term, 1955

Filed United States Court of Appeals—Tenth Circuit, Dec. 27, 1955. Robert B. Cartwright, Clerk.

Number 5203.

Kansas City Southern Railway Company, a corporation, Appellant,

vs.

James H. Cagle, Appellee.

Appeal from the United States District Court for the Northern District of Oklahoma.

[OPINION.]

Kelly Brown (P. H. Hardin and John M. Wheeler were with him on the brief) for Appellant;

Pat Malloy (William H. DeParcq and Charles Alan Wright were with him on the brief) for Appellee.

Before BRATTON and HUXMAN, United States Circuit Judges, and CHRISTENSON, District Judge.

HUXMAN, Circuit Judge.

This was an action by appellee, James H. Cagle, against the appellant, the Kansas City Southern Railway Company, to recover damages for injuries suffered in attempting to effect a coupling of two box cars in a train being operated by appellant. It was instituted under the Coupler Provisions of the Safety Appliance Act of the United States.[1] Appellee

1. 45 U. S. C. A., Sec. 2, provides that: "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

was employed by appellant as a brakeman and was engaged in the performance of his duties at the time he suffered the injuries complained of.

The complaint alleged that at the time of the accident he was engaged in certain switching operations; that in connection therewith a coupling was to be made between two cars; that while performing his services appellant violated the Act in moving and hauling a car when the drawbar was out of alignment and in such a condition that it would not couple automatically with the other car upon impact; that as a result it was necessary for him to manually allign the drawbar so the coupling could be made and, while doing this, he suffered the injuries for which recovery was sought.

A trial was had to a jury. At the conclusion of appellee's evidence, appellant moved for an instructed verdict and again so moved at the conclusion of all the evidence. These motions were overruled and the case was submitted to the jury. It returned a verdict for appellee. A motion for a new trial and a supplemental motion for a new trial were overruled and judgment was entered upon the verdict.

While six assignments of error are urged, they in effect raise only two substantial issues. These are: (1) There was no evidence warranting the submission of the case to the jury; and (2) the court erred in overruling appellant's motion for a new trial and especially its supplemental motion for a new trial.

Appellee's evidence tended to establish these facts. At the time of the accident he was riding on the lead end of a car which was being backed in a southerly direction to couple with another car, referred to as the Rock Island car; that the drawbar on the car that appellee was riding on was in proper alignment and the knuckle on the coupler was open; that if the drawbar on the Rock Island car had been in line it would have been possible to couple automatically, but that the drawbar on the Rock Island car was so far out of line to the west that it was not possible to couple it; that

appellee had much experience in coupling cars and could tell on approaching a drawbar when it was out of line; that he signalled to the engineer to stop and went between the cars to pull the drawbar of the Rock Island car into line; that in doing so he suffered the injuries complained of for which recovery was sought and obtained.

The one fact upon which appellant was sought to be held liable was that it was operating a car on which the drawbar was so far out of line that it could not be coupled automatically by impact. Appellant states the question in its brief to be, "Was this one fact that the coupler was out of line a noncompliance with the Act?" We think the answer to this question must be in the affirmative.

A great number of cases have considered the scope and effect of the Coupler Provision of the Federal Safety Appliance Act. Space prevents even a listing of all the cases which have considered these provisions, let alone an analysis thereof. Without exception they have held that the Act requires that cars be so equipped that they will couple automatically by impact and can be coupled and uncoupled without the necessity of persons going between them.[2] Without exception the cases have held that operating a car on which the drawbar is so far out of line as to prevent automatic coupling violates the Act and imposes absolute liability.[3] This principle of law was restated by the Supreme Court in the late case of *Affolder* v. *N. Y., C. & St. L. R. Co.*, 339 U. S. 96, where the court again said: " * * * we held that the plaintiff did not have to show a 'bad' condition of the coupler; she was entitled to a peremptory instruction that to equip a car with a coupler which failed to perform properly 'in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximate-

2. Atlantic City R. R. Co. v. Parker, 242 U. S. 56; Hohenleitner v. Southern Pac. Co., 177 Fed. 796; San Antonio Ry. Co. v. Wagner, 241 U. S. 476; Chicago, St. P., N. & O. Ry. Co. v. Muldowney, 130 F. 2d 971.

3. O'Donnell v. Elgin J. & E. R. Co., 338 U. S. 384; Kansas City M. & O. Ry. Co. v. Wood, 262 S. W. 520.

ly resulting therefrom, and that neither evidence of negligence nor of diligence a[nd] care was to be considered on the question of this liabilit[y].' Further we said, 'a failure of equipment to perform a[s] required by the Safety Appliance Act is in itself an actio[nable wrong * * *].'" Neither is the impact of this pronou[ncement weakened by the further statement in the opinio[n that if "'the failure of these two cars to couple on impa[ct was because the coupler on the Pennsylvania car had n[ot been properly opened,' the railroad had a good defense." In the first place that statement was not essential to the opinion and was, therefore, in the nature of dicta and, fu[rthermore, it was said with respect to the consequences if t[he failure to couple resulted from a closed coupler and not [from a drawbar so far out of alignment that automatic cou[pling would not result even if the coupler was open.

The trial court cor[rectly instructed the jury that the only questions of fact w[ere, was the drawbar so far out of alignment as to prevent [automatic coupling of the two cars, and were appellee's in[uries the proximate result, if the first question was answ[ered in the affirmative? Appellee adduced sufficient evid[ence to take these questions to the jury for its determinati[on and its determination is supported by substantial eviden[ce.

Appellant's conten[tion that the court erred in overruling its supplemental [notion for a new trial is predicated on the discovery of new [evidence after the trial. The facts which appellant asserts [entitle it to a new trial on this ground are these: Be[fore trial appellant took appellee's deposition in which it [asked appellee whether prior to the date of this accident he [had ever suffered any injury to his back; whether he had [uffered any injury from any other cause; and whether he [ad had any other injury for which he had received medical [attention. In general, he answered in the negative or answ[ered none that he could remember. When appellee was on [he witness stand, he indicated hospitalization in a veter[ans' hospital. Appellant states that

this was the first instance it had notice of such hospitalization; that thereafter it made an investigation and ascertained he had made application to the Veterans' Administration claiming disability; that the claim was disallowed because not service connected; but that he was diagnosed as a constitutional psychopath. The application also revealed he had claimed that he had had stomach ulcers.

In *Marshall's U. S. Auto Supply* v. *Cashman,* 111 F. 2d 140, we said that a motion for a new trial on the grounds of newly discovered evidence must show "that the evidence was discovered since the trial; must show facts from which the court may infer reasonable diligence on the part of the movant; must show that the evidence is not merely cumulative or impeaching; must show that it is material; and must show that it is of such character that on a new trial such evidence will probably produce a different result." We do not feel that the proffered newly discovered evidence meets this test. It does not directly contradict any answers appellee gave in his deposition. All that he answered was that he had suffered no other injuries. It is doubtful if a stomach ulcer is ordinarily classified as an injury. The fact remains that appellee was working as a brakeman, apparently in an efficient manner, and that he had been so working for a considerable time. Furthermore, we are of the view that in any event this newly discovered evidence is not of such a nature as would probably produce a different result. This no doubt was the view of the trial court.

AFFIRMED.

JUDGMENT.

Twenty-seventh Day, November Term, Tuesday, December 27th, 1955.

Before Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges, and Honorable A. Sherman Christenson, District Judge.

This cause came on to be heard on the transcript of the

record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said district court in this cause be and the same is hereby affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 3606, Civil.

James H. Cagle, Plaintiff,

vs.

Kansas City Southern Railway Company, a corporation, Defendant.

JOURNAL ENTRY OF JUDGMENT.

This cause came on for trial on the 4th day of February, 1955, before Honorable Royce H. Savage of this Court, pursuant to regular assignment and published docket of this Court. The plaintiff, James H. Cagle, appeared in person and by his attorneys of record, Wm. H. DeParcq and Pat Malloy, and the defendant, The Kansas City Southern Railway Company, a corporation, appeared by its duly authorized officials and by its attorney of record, Kelly Brown and P. H. Hardin, and both parties announced ready for trial. Thereupon a jury was impaneled and sworn and evidence was submitted. After proceedings in the hearing of the evidence, an adjournment of the Court was had from the 5th day of February, 1955, to the 7th day of February, 1955, and thereupon a trial of said cause was further had and after the submission of all the evidence on the part of both the plaintiff and the defendant and the testimony and the argument, the Court duly instructed the jury and said cause was submitted to the jury for its determination. After due deliberation the jury returned in open court its verdict in words and figures as follows, to-wit:

"VERDICT.

We, the jury, in the above cause duly impaneled and sworn upon our oaths find for the plaintiff and assess damages in the amount of $35,000.00."

Upon reading of said verdict in open court in the presence of counsel of both parties judgment was pronounced in accordance with said verdict.

It Is Therefore Ordered, Adjudged and Decreed that the plaintiff, James H. Cagle, have judgment for the sum of Thirty-five Thousand ($35,000.00) Dollars.

Royce H. Savage, Judge.

APPENDIX B.

45 U. S. C. A., Section 2:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."